

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DEXTER EARL KEMP, )  
                    Petitioner, )  
                    v. ) No. 21-5726  
UNITED STATES, )  
                    Respondent. )  
- - - - -

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1 P R O C E E D I N G S

2 (11:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 21-5726, Kemp versus  
5 United States.

6 Mr. Adler.

7 ORAL ARGUMENT OF ANDREW L. ADLER

8 ON BEHALF OF THE PETITIONER

9 MR. ADLER: Mr. Chief Justice, and may  
10 it please the Court:

11 Rule 60(b)(6) governs this case  
12 because Rule 60(b)(1) does not. That is so for  
13 two independent reasons. First, Rule 60(b)(1)  
14 does not cover legal errors. Second, it does  
15 not cover judicial errors. It does not cover  
16 legal errors because the word "mistake" means  
17 mistake of fact. (b)(1) copied 17 state laws,  
18 and they overwhelmingly excluded legal errors.

19 That makes perfect sense in this  
20 context. The three words accompanying "mistake"  
21 are all terms of art describing factual mishaps.  
22 60(a) uses the word "mistake" to mean mistake of  
23 fact. And 60(b)(1) through (3) have a one-year  
24 deadline precisely because they are factual  
25 defects. Meanwhile, (b)(4) through (6) do not

1 have such a deadline, and we already know that  
2 they cover legal errors.

3 If (b)(1) covered legal errors as  
4 well, that would contravene the structure of the  
5 rule. (b)(1) does not cover judicial errors  
6 either. Those errors should be corrected under  
7 Rule 59(e) or on appeal, which have strict  
8 deadlines. Where a party fails to do so, they  
9 should -- I'm sorry, where a party fails to do  
10 so, they should pay the price by having to show  
11 extraordinary circumstances under (b)(6).

12 (b)(1), however, requires no  
13 heightened showing at all. So, if (b)(1)  
14 covered judicial errors, (b) -- people could use  
15 (b)(1) to get around the deadlines, and that  
16 regime is not sound.

17 Neither is the government's definition  
18 of "mistake." Originally, the government said  
19 that "mistake" meant any and all errors. Now  
20 they say that "mistake" means only unintentional  
21 and obvious errors.

22 Slicing and dicing errors in that  
23 manner is unsupported and unworkable. No  
24 circuit has adopted that approach, and this  
25 Court should not impose an untested, subjective

1 standard on lower courts and litigants.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Adler, are you  
4 conceding that your -- that the plain meaning of  
5 the word "mistake" doesn't work for you?

6 MR. ADLER: Justice Thomas, it depends  
7 what you mean by "the plain meaning of the word  
8 'mistake.'" If you mean any --

9 JUSTICE THOMAS: Well, the judge made  
10 a mistake here.

11 MR. ADLER: Sure, Your Honor, but it  
12 can't mean that in this context, and I'd like to  
13 give three reasons why, based on the text,  
14 structure, and precedent.

15 Starting with precedent, this Court  
16 has about a handful of cases analyzing legal  
17 errors under (b)(6). If (b)(1) included all  
18 legal errors, that would conflict with the  
19 (b)(6) precedents because those two subdivisions  
20 are mutually exclusive.

21 Relatedly, as to the structure, if  
22 (b)(4) -- (b)(4) through (6) already cover legal  
23 errors, and so that would mean that any errors  
24 under those subdivisions would simultaneously be  
25 covered under (b)(1). That would create

1 substantial redundancy within the rule.

2           And, thirdly, as for -- it would  
3 create troubling implications for Rule 60(a).  
4 If "mistake" meant any and all legal errors,  
5 then that would mean legal errors arising from  
6 oversight or omission would be covered by 60(a),  
7 and that would eviscerate finality because 60(a)  
8 has no deadline at all. And judges could come  
9 in decades later and start correcting legal  
10 errors. They can do it sua sponte and without  
11 notice to the parties. So it cannot mean any  
12 and all errors.

13           That is why the government has  
14 expressly disavowed that position on page 15 of  
15 its brief in this case. The problem is the  
16 government's position is no better. They have  
17 some of the exact same problems here, but you've  
18 added on top of it major workability problems as  
19 well with this unintentional and obvious  
20 limitation.

21           We -- those -- those words are just  
22 entirely subjective, and how is a litigant  
23 supposed to know whether the judge's error was  
24 intentional or not? Is the government  
25 suggesting we put them on the stand? That would

1 be a fraught enterprise.

2 And as for "obvious," that also is  
3 inherently subjective. What's obvious to the  
4 litigant may not be obvious to the judge. And  
5 people need to know what subdivision applies on  
6 the front end because we have to know if there's  
7 a one-year deadline or if they have to make a  
8 heightened showing, like extraordinary  
9 circumstances.

10 And so our position is really the only  
11 viable position here. And -- and our position  
12 reads the rules as a coherent whole. It  
13 respects precedent, and it's entirely --  
14 entirely workable.

15 If you take (b)(1) off the table for  
16 legal errors, then there's just no question  
17 where they go. They all go in (b)(6) --

18 JUSTICE BARRETT: But you have the  
19 difficulty of distinguishing between fact and  
20 law, and then you also have the difficulty in  
21 identifying whose error was it. I mean, I think  
22 the government makes a good point, that it can  
23 be difficult to figure out if a legal error was  
24 by the litigant or by the court. You know,  
25 here, you could say, well, the lawyer failed to



1 point out that the cert deadline ran differently  
2 when his co-defendants had sought cert. Lawyer  
3 made a mistake, and then the judge didn't catch  
4 it and find that authority on his own.

5 So is it really as clear as you say?  
6 And, plus, I'll just throw out for good measure  
7 too that when you point out that the other  
8 provisions in 60(b) are also referencing legal  
9 errors and so there would be a lack of clarity  
10 about whether they fell -- where they fell, the  
11 specific controls the general, right? And those  
12 are all specific kinds of errors, you know,  
13 void, et cetera.

14 So could you address that?

15 MR. ADLER: Sure. So I guess I'll  
16 start with the second part of that first.

17 The only other rules that we know,  
18 putting aside (b)(1), that cover legal errors  
19 are (b)(4) for void judgments and (b)(5). Those  
20 are pretty narrow categories, and they're also  
21 mutually exclusive with (b)(6). So, if they  
22 don't fall in (b)(4) and (b)(5), we know they go  
23 in (b)(6). If you open up (b)(1), then we're  
24 going to have a lot of confusion about where  
25 they go.

1           As for the first part of your  
2     question, the fact/law distinction is a very  
3     familiar distinction that courts around the  
4     country apply every day. We do it in standards  
5     of review. And we do this specific mistake of  
6     law/mistake of fact distinction all the time  
7     across various areas of the law. And, most  
8     importantly, it's an objective distinction. We  
9     don't have to get into somebody's mind to know  
10    whether it's, you know, obvious or intentional  
11    or not.

12           So, while I grant you that there may  
13    be some hard cases on the margins about fact/law  
14    as a whole, it's going to be much easier and  
15    much more workable than the government's  
16    standard --

17           JUSTICE BARRETT: Well, we apply clear  
18    error standards in courts every day too.

19           MR. ADLER: For -- for findings of  
20    fact.

21           JUSTICE BARRETT: For appeal.

22           MR. ADLER: Correct. And so that's  
23    what I mean. When appellate courts --

24           JUSTICE BARRETT: Well, for forfeited  
25    -- in cases of forfeiture too, right?

1 MR. ADLER: So plain error.

2 JUSTICE BARRETT: Plain error.

3 MR. ADLER: Plain error, sure. So  
4 that analogy, I don't think, quite holds up here  
5 because that's an appellate court doing it after  
6 the fact and looking at the state of the law at  
7 the time and the record.

8 And, here, we really should be looking  
9 at this from the perspective of the litigant  
10 because it's the litigant that has to know what  
11 subdivision to file the motion under. And so  
12 it's going to -- we need an objective  
13 distinction here. Fact/law is -- is an easy  
14 one.

15 As for the facts of this case, I mean,  
16 I think, if anything, they show the problems  
17 with the government's position here because the  
18 error in this case was overlooked by the  
19 government and the district court twice,  
20 including after Mr. Kemp brought it to their  
21 attention in the 60(b) motion.

22 And yet the government is here saying  
23 that this was an obvious and unintentional  
24 error? Well, if that's true, I'm not really  
25 sure what -- what wouldn't be.

1           So -- so I grant you that there may be  
2     some hard cases fact/law-wise, but they're just  
3     going to pale in comparison to the problems that  
4     we're going to see with the government's  
5     position.

6           JUSTICE KAVANAUGH: Well, the  
7     government's position is -- is not the same, as  
8     you know, as the Judge Friendly position, which  
9     is, to Justice Thomas's question, more the  
10    ordinary meaning of "mistake." "Mistake" can  
11    mean a mistake of law. Professor Moore, Judge  
12    Friendly, it's been applied in the Second  
13    Circuit and a bunch of other circuits, it seems  
14    workable enough there.

15           They put in a deadline for filing it.  
16    Why not just -- why is that not a simple route?  
17    It's not the government's position as I  
18    understand it. But why is that not a simple --

19           MR. ADLER: So, you know, I don't want  
20    to say anything disparaging about Judge  
21    Friendly, but I think that opinion was wrong.  
22    And it didn't conduct a textual analysis. It  
23    didn't conduct a structural analysis of the  
24    rule. It was part of a line of 1960s opinions  
25    by the courts of appeals that basically said,

1 well, we need a mechanism for district courts to  
2 correct their own errors.

3 But what they overlooked was that  
4 59(e) provides that exact mechanism.

5 JUSTICE KAVANAUGH: Right. There's  
6 definitely overlap then. I grant you that. But  
7 it's been the way it's been interpreted, and  
8 there's going to be redundancies here, a lot of  
9 our usual canons are not going to be able to  
10 solve all the problems that are going to be  
11 created no matter which interpretation we adopt,  
12 but it's been workable in the Second Circuit and  
13 several other circuits for a long time.

14 CHIEF JUSTICE ROBERTS: And it's not  
15 that surprising that Judge Friendly may not be  
16 very familiar with mistakes of law.

17 (Laughter.)

18 MR. ADLER: Very well, Your Honor.  
19 Well --

20 JUSTICE BREYER: I can think of at  
21 least three decisions we've written, one in a  
22 patent case that I think a footnote which was  
23 pretty interesting, and Justice Kagan wrote a  
24 decision, I wrote it.

25 Why do we have to keep writing these

1 decisions if it's so clear? Maybe we just make  
2 it worse, but, I mean, the -- the -- the  
3 decision between fact and law, it seems to me  
4 they're always coming up, and it's actually not  
5 so easy. Sometimes it is.

6 And then the argument the other way  
7 would be we're going to have that problem, and,  
8 you know, I'm sitting there as a trial judge and  
9 I actually got confused between shifting and  
10 springing uses. And at the end of the case, I  
11 think, oh, my God, I should have said shifting  
12 use. It was not a shifting use, it was a  
13 springing use. Oh, my goodness, and -- and I  
14 can't say it's major, but I'd like to correct it  
15 right now. All right? Matter of law.

16 So -- so what they're saying, look,  
17 the judges do make mistakes. Give them a quick  
18 chance to do it, even if it's one of law. Call  
19 it to their attention. Six of one, half dozen  
20 of the other because we have problems both ways.

21 MR. ADLER: Justice Breyer, judges  
22 have that authority under Rule 59(e). That's  
23 what Rule 59(e) is for.

24 JUSTICE BREYER: But they might not  
25 know it until actually three months later,

1     because they do not read every night the  
2     shifting/springing new section of the American  
3     Law of Property. And -- and then they realize  
4     it.

5                 JUSTICE BARRETT: Well, and let me  
6     just add one thing to Justice Breyer's  
7     hypothetical. Let's say that the  
8     shifting/springing thing comes to light after  
9     the Rule 59 deadline has passed.

10                What's the extraordinary circumstance  
11     that justifies fixing it? I mean, maybe it's  
12     just a regular old error and we'd like to fix it  
13     without having to show a heightened standard.

14                MR. ADLER: Well, I really think the  
15     onus is going to be on the parties there to --  
16     to file the motion under 59(e) or to file an  
17     appeal. That's how legal errors get corrected  
18     in our system.

19                And our position respects those  
20     primary mechanisms for doing that and their  
21     deadlines. If you miss those deadlines, if you  
22     miss the 59(e) deadline, if you miss the appeal  
23     deadline, then you've got to show extraordinary  
24     circumstances. Otherwise, those deadlines  
25     really don't mean anything. And --

1 JUSTICE KAVANAUGH: What about the --

2 I don't want to interrupt. You have more?

3 MR. ADLER: Yeah. Please, Your Honor.

4 JUSTICE KAVANAUGH: What about the  
5 60(b)(1) that the courts have imposed a deadline  
6 saying reasonable time means within 30 days or  
7 60 days or what have you?

8 MR. ADLER: Sure, Your Honor. So,  
9 number one, that doesn't --

10 JUSTICE KAVANAUGH: That solves that  
11 problem.

12 MR. ADLER: Well, it doesn't solve the  
13 59(e) problem because --

14 JUSTICE KAVANAUGH: No, there's, I  
15 agree, total overlap.

16 MR. ADLER: So you come in on day 50  
17 -- you come in on day --

18 JUSTICE KAVANAUGH: But is there a  
19 problem from that? I mean, this is a rules  
20 committee question more than a judicial  
21 question, but I'll just ask you, is there -- you  
22 know, is there a real-world problem from the  
23 Second Circuit's approach with the overlap plus  
24 the time limit on filing the 60(b)(1)?

25 MR. ADLER: So I -- I just think it



1 doesn't make sense with the rules as a whole  
2 because, first of all, now that the 59(e)  
3 deadline is 28 days and most appeals, the  
4 deadline is 30 days --

5 JUSTICE KAVANAUGH: Right.

6 MR. ADLER: -- it's not really  
7 accomplishing anything.

8 JUSTICE KAVANAUGH: It's a weird  
9 two-day --

10 MR. ADLER: Yeah. It's not doing  
11 anything. So the -- the other thing is that,  
12 you know, it just doesn't make sense to have a  
13 non-extendable 28-day deadline for 59(e). If  
14 you can just come in on day 29 using another  
15 rule to do the exact same thing, that's just not  
16 a coherent system. That's not reading the rules  
17 in harmony.

18 JUSTICE SOTOMAYOR: Counsel, the rules  
19 are in harmony because it's not that you have a  
20 year to bring a 60(b)(1) motion. You have to  
21 bring it within a reasonable time, up to one  
22 year. And so, if you could have brought it  
23 under 59(e), a court is going to ask or on a  
24 direct appeal, a court is going to ask bringing  
25 it after that time passed, is there a reason for

1       that?

2                   If there's not a reason for that,  
3       here, the reason would be my attorney, the  
4       government, the court, we're were all  
5       incompetent and I'm the only one who did it and  
6       I'm pro se and didn't have time. I believe most  
7       judges would say, you're right, I made a mistake  
8       and grant it to you.

9                   But I want to go to the more important  
10      question. The circuits are all over the place.  
11      Only the Fifth and Tenth go the government's way  
12      with an obvious legal error. As Justice  
13      Kavanaugh pointed out, the Second, Sixth,  
14      Seventh, and Eleventh call it any legal error.  
15      I'm really not sure what the difference means or  
16      why.

17                  What I am concerned about is those  
18      circuits that permit 60(b)(6) motions when  
19      there's been a change in law or an intervening  
20      change in the law that renders the initial  
21      judgment based on overruled or changed laws.

22                  We've even done it in Buck under  
23      60(b)(6). How do we write this opinion to avoid  
24      barring that, meaning do we have to write it the  
25      Second, Sixth, Seventh, and Eleventh way or the

1 Fifth and Tenth way? But how do we avoid  
2 opining on that inadvertently? Because it can't  
3 be all legal errors where the government  
4 suggests that are obvious or not obvious.

5 MR. ADLER: I think --

6 JUSTICE SOTOMAYOR: So how do we write  
7 this if we were to rule --

8 MR. ADLER: I think --

9 JUSTICE SOTOMAYOR: I know we're  
10 asking you to rule against yourself, but I think  
11 it's important to --

12 MR. ADLER: Well, that's what I was  
13 going to say. I was going to say that I think  
14 that's a question for the government because the  
15 whole reason they've come up, I think, with this  
16 unintentional and obvious definition is to get  
17 around as many of this Court's (b)(6) precedents  
18 as they can which concern subsequent changes in  
19 the law.

20 There's at least four of --

21 JUSTICE SOTOMAYOR: But that's  
22 logical, isn't it? You can't anticipate  
23 subsequent changes in law. And that's what  
24 60(b)(6) is about.

25 So I'm asking you -- yes, I'm asking

1     you to take a position contrary to your  
2     interests but to save something that makes  
3     sense. So how do we write it?

4             MR. ADLER: I -- I think the only way  
5     to write it is based on the government's  
6     definition of unintentional and obvious is the  
7     -- is what mistake means. And I don't see how  
8     the Court can write that opinion without --  
9     without throwing the lower courts and litigants  
10    into complete chaos. While the Fifth and Tenth  
11    Circuits have written this -- have this obvious  
12    limitation, no circuit has this  
13    unintentional/intentional limitation, and that's  
14    the really big problem here.

15            And in addition to the  
16    administrability problems, it's contrary to this  
17    Court's decision in *Liljeberg*, which was a  
18    classic unintentional oversight, yet this Court  
19    analyzed it under (b)(6). And it would also  
20    render language in 60(a) superfluous. If  
21    "mistake" by definition included unintentional  
22    oversights, then the oversight or omission  
23    language in 60(a) would be unnecessary.

24            So I think that's the only way to  
25    write the opinion to preserve those other 60(b)

1 cases --

2 JUSTICE KAVANAUGH: Well --

3 MR. ADLER: -- but I don't think it's  
4 a viable option for the Court here.

5 JUSTICE KAVANAUGH: -- I share Justice  
6 Sotomayor's concern about the 60(b)(6) being  
7 preserved for subsequent changes, but in the  
8 Second Circuit, presumably, but correct me if  
9 I'm wrong, and in those other circuits that  
10 follow the Second Circuit's rule, presumably,  
11 60(b)(1) is available for mistakes of law, but  
12 60(b)(6) is still available for intervening  
13 changes in the law that come after that  
14 deadline, but correct me if I'm wrong about  
15 that.

16 MR. ADLER: I -- I believe that is  
17 correct, Your Honor, but those 60(b)(6) cases,  
18 they're going to have to show extraordinary  
19 circumstances.

20 JUSTICE KAVANAUGH: Well, a change in  
21 the law often -- well, tell me -- tell me what  
22 you think "extraordinary circumstance" means in  
23 relation to changes in the law. You know,  
24 you're a district court judge and a circuit  
25 decision comes out two months later. What --

1     what -- what do you say to that?

2                 MR. ADLER:  So, in -- in this Court's  
3     decision in Gonzalez, I think the Court was  
4     pretty clear that a subsequent change in the law  
5     by itself is not going to be an extraordinary  
6     circumstance because that's just going to  
7     disrupt finality too much.

8                 So you've got to show something else  
9     along with that.  And so I think this Court's  
10    decision in Buck versus Davis is a good example  
11    of that.  It was a subsequent change in law and  
12    procedural default coupled with, you know, very  
13    unusual and troubling circumstances about the  
14    use of race in a capital sentencing.  And so I  
15    think, you know, that's how we deal with  
16    subsequent changes to the law.

17                Now this situation, we have a legal  
18    error that existed at the time of the judgment,  
19    and the question there under extraordinary  
20    circumstances is going to be, why didn't you  
21    appeal this?  Why didn't you correct this on  
22    appeal?

23                And that's the question that this  
24    Court asked in Ackermann and in Liljeberg.  And  
25    in Ackermann, the Court said, well, you can't

1 show extraordinary circumstances because you  
2 made a cost/benefit decision not to appeal this.  
3 And in Liljeberg, the Court said, oh, well,  
4 we're going to grant -- we think (b)(6) relief  
5 is appropriate there because there was no way  
6 for you to know about the legal error in time to  
7 appeal.

8           And that's exactly the situation here.  
9 Mr. Kemp, through no fault of his own, could not  
10 have ascertained the basis of the legal error in  
11 the district court's judgment in time to appeal  
12 it. And the reason why is that he was  
13 transferred from federal prison to Miami-Dade  
14 County jail in pretrial detention, and he was  
15 not allowed to bring his legal materials and he  
16 was not allowed to conduct any legal research  
17 there.

18           He had no access to this Court's  
19 rules, and so he could not have just opened to  
20 Rule 13.3 and discovered the legal error in the  
21 district court's ruling. And this is precisely  
22 why we have (b)(6), to serve as a catch-all in  
23 cases to remedy gross injustice. That's why we  
24 have it. It's not going to come up very often,  
25 but we need to preserve it.

1                   And if you expand (b)(1), what you're  
2                   going to do is contract (b)(6) because they're  
3                   mutually exclusive provisions. And I think the  
4                   Court needs to be very careful before it does  
5                   something like that.

6                   CHIEF JUSTICE ROBERTS: You can  
7                   proceed with your argument.

8                   MR. ADLER: Thank you, Your Honor.  
9                   I'm trying to think about where to go from here.

10                  So I guess one thing we haven't talked  
11                  about is the judicial error. So we have a  
12                  second theory in this case, which is that even  
13                  if legal errors are -- are not covered by  
14                  (b)(1), judicial errors are not either.

15                  And the government places the entire  
16                  weight of its argument on the removal of a  
17                  pronoun in 1946. And, basically, what the  
18                  government is saying is that when the committee  
19                  removed a pronoun, it transformed 60(b)(1) into  
20                  essentially a substitute for an appeal.

21                  And I just don't think that is a  
22                  plausible take on the history here.

23                  CHIEF JUSTICE ROBERTS: Why do you  
24                  think they did it?

25                  MR. ADLER: To capture mistakes by



1     third parties like process servers, notaries,  
2     postal workers, and -- and that's why they did  
3     it. And we know that from several sources, not  
4     just this Court's precedent in Liljeberg but  
5     also the official explanation in the advisory  
6     committee note, which explains that they did it  
7     to capture mistakes that warranted the  
8     supervisory jurisdiction of the courts.

9             And courts don't exercise supervisory  
10     jurisdiction over their own mistakes but,  
11     rather, the mistakes of others. And the  
12     government --

13            JUSTICE BARRETT: But the statute --  
14     not the statute, sorry -- the rule doesn't --  
15     nothing on the face of the rule excludes courts.  
16     And what about the point I made before, which  
17     was a repetition of the government's point, that  
18     it can be difficult to figure out whose error it  
19     was? It could be categorized as the counsel's  
20     error. It could be categorized as the court's  
21     error.

22            MR. ADLER: So, Your Honor, I don't  
23     think that's a difficult distinction when we're  
24     talking about legal errors because the district  
25     court has an independent obligation to ascertain

1 and apply the law in every case regardless of  
2 what the parties say. And so, when there's a  
3 legal error, the only question is, well, did the  
4 district court commit an error? It doesn't  
5 matter what the parties say.

6 As for the text, we rely on the  
7 noscitur a sociis canon for this, the  
8 accompanying words all involve things that do --  
9 that judges don't do or they don't commit.  
10 Surprise, excusable neglect, those aren't  
11 judicial actions here.

12 And -- and then, of course, we have  
13 our structural argument about respecting the  
14 deadlines for 59(e) and appeal. And so, you  
15 know, if (b)(1) did the exact same thing and  
16 covered legal errors, then that regime just  
17 doesn't work. It doesn't make sense.

18 And there's not going to be any repose  
19 in the system when someone fails to appeal. If  
20 someone doesn't appeal, then, you know,  
21 typically, we should require extraordinary  
22 circumstances in order to reopen a final  
23 judgment. People need to be able to rely on  
24 that judgment.

25 But, on the government's view, there's

1 not going to be any repose for an entire year.  
2 So -- because all you have to do is come in on a  
3 reasonable time and show a legal error and you  
4 can reopen the judgment. I just don't think  
5 that is consistent with our conception of  
6 finality and repose that we typically think of  
7 in litigation.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas, anything further?

11 JUSTICE THOMAS: Nothing, Chief.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Breyer? No?

14 Justice Barrett?

15 Thank you very much.

16 Mr. Snyder?

17 ORAL ARGUMENT OF BENJAMIN W. SNYDER

18 ON BEHALF OF THE RESPONDENT

19 MR. SNYDER: Mr. Chief Justice, and  
20 may it please the Court:

21 Rule 60(b)(1) gives courts discretion  
22 to grant relief based on mistakes. In ordinary  
23 usage, that word sometimes refers  
24 indiscriminately to all errors. Other times,  
25 the word is used in a narrower sense that covers

1     only inadvertent errors. But, under either of  
2     those definitions, the district court's error  
3     here clearly qualifies as a mistake that the  
4     court could have addressed through a timely Rule  
5     60(b)(1) motion.

6             In arguing otherwise, my friend  
7     proposes two limitations on Rule 60(b)(1). He  
8     says that it excludes all legal mistakes and all  
9     mistakes by judges. There is no possible way to  
10    reconcile either of those limitations with the  
11    ordinary meaning of "mistake." And my friend  
12    does not even try. Instead, he stakes his case  
13    on the idea that the drafters of Rule 60(b)  
14    understood "mistake" as a term of art that  
15    carried his proposed limitations.

16            But that argument is dead wrong. All  
17    agree that Rule 60(b) was based on Section 473  
18    of the California Code of Civil Procedure, and  
19    it was well settled that Section 473 covered  
20    mistakes of law as well as mistakes of fact, as  
21    Professor Moore explained in his treatise just a  
22    year after helping to draft the first version of  
23    the Federal Rules.

24            My friend dismisses that understanding  
25    as limited to default judgment cases. But

1 nothing in Section 473 distinguished between  
2 default cases and other cases, and the  
3 California Supreme Court squarely recognized  
4 that Section 473 covered mistakes of law made  
5 outside the default judgment context.

6 As to the distinction between mistakes  
7 by parties and mistakes by courts, it's true  
8 that the original version of Rule 60(b) covered  
9 only mistakes by the movant himself. But, in  
10 1946, the rule was amended to remove any textual  
11 limitation on whose mistakes could provide a  
12 basis for relief.

13 My friend speculates that the advisory  
14 committee still silently intended to exclude  
15 judicial mistakes. But that speculation has no  
16 grounding in the text of the rule. If the  
17 committee had wanted to exclude judicial  
18 mistakes as a basis for relief from judicial  
19 orders, it would surely have said so expressly.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Mr. Snyder, you argue  
22 in your brief, I think, that not every error is  
23 a mistake. I don't know what the difference is.  
24 I don't know why an error is not a mistake.

25 MR. SNYDER: So, Justice Thomas, there

1 are two categories of -- of dictionary  
2 definitions of the word "mistake." Some  
3 categories do include all miss -- or all errors.  
4 And, if forced, we would choose that  
5 interpretation over Petitioner's interpretation.

6 But there's another understanding of  
7 "error" that dictionaries define as -- in a way  
8 that focuses on inadvertent or unintentional  
9 errors. And we think that context suggests that  
10 "mistake" is used in that latter sense here.  
11 Most specifically, the -- the words surrounding  
12 "mistake" in 60(b)(1) all carry a connotation of  
13 inadvertence. And so we think it makes sense to  
14 read "mistake" in that inadvertence-focused way  
15 as well.

16 Now my friend has said that that would  
17 provide a subjective standard that would be  
18 incredibly difficult to administer. I think the  
19 key thing to remember in thinking through how  
20 you would administer that test is that it's the  
21 district courts themselves that are applying  
22 Rule 60(b) in the first instance.

23 And no one is better positioned than  
24 the district court to say whether the error in  
25 the decision that he or she just entered was

1 just an oversight, just something that they  
2 completely missed, like the error here, or  
3 instead was something that they thought through  
4 and just resolved in a way differently than the  
5 one the movant would have preferred.

6 JUSTICE KAVANAUGH: Why would we do  
7 that? It just seems like asking for a whole lot  
8 of litigation about the difference between an  
9 obvious mistake -- suppose you interpret the  
10 statute one way and then you read some more in  
11 response to the 60(b) motion and you say, you  
12 know, I think I got it wrong. Does that qualify  
13 as a mistake or not?

14 MR. SNYDER: So, if -- if on the -- if  
15 in your first judgment you thought through it,  
16 you thought through the issue and just resolved  
17 it a particular way, you -- you later have  
18 second thoughts, that is something you could  
19 address in 59(e), but we don't think that that  
20 comes within 60(b)(1).

21 JUSTICE KAVANAUGH: But, if you just  
22 missed the relevant subsection of the statute  
23 the first time you read it or it wasn't cited to  
24 you and you -- you didn't see it yourself, that  
25 would qualify?

1                   MR. SNYDER: That's right, Your Honor.  
2     We think that makes sense in light of the role  
3     that 60(b)(1) plays in this broader scheme.  
4     There are other ways that you can raise errors  
5     where you just disagree with the decisionmaker.  
6     And so the -- the key --

7                   JUSTICE KAVANAUGH: Why -- why is this  
8     inquiry worth it, I -- I guess, as opposed to  
9     the Second Circuit and other circuit approach?  
10    I just don't understand this collateral inquiry  
11    into, well, it wasn't an inadvertent -- it was  
12    -- you know, why not just say mistakes are  
13    mistakes, as Justice Thomas indicated, and --  
14    what -- what problems are created?

15                   You changed your position from the --  
16    well, shifted a little bit your position from  
17    the BIO to the -- the brief here. Why? And --

18                   MR. SNYDER: So -- so I don't think we  
19    understood ourselves to be changing our position  
20    at all. If you look at the -- at page 12 of our  
21    opp, which is where my friend focuses, our  
22    argument was just that the error here is a  
23    mistake under any conceivable understanding of  
24    that word.

25                   And we think that is correct. We



1       didn't say in the opp that every possible error  
2       would be covered.

3               JUSTICE KAVANAUGH:   Okay, but what --  
4       on the broader question, why is it worth doing  
5       this rather than just the Second Circuit  
6       approach?   What --

7               MR. SNYDER:   So --

8               JUSTICE KAVANAUGH: -- what problems  
9       would be created?

10              MR. SNYDER:   So I -- I don't want to  
11       suggest that we think there's some huge problem  
12       with the -- what you're calling the Second  
13       Circuit approach, the approach of treating all  
14       legal errors as mistakes.   The primary reason  
15       that we have argued for an interpretation that  
16       focuses only on inadvertent mistakes is that we  
17       think that makes the most sense in light of the  
18       surrounding words in (b)(1).

19              There's also to some extent the  
20       concern that Justice Sotomayor was identifying  
21       about instances in which a decision is correct  
22       as a -- as a matter of law when it's entered,  
23       and then some subsequent decision comes along  
24       from a higher court and results in a -- a change  
25       in the law that we don't think is appropriate in

1     that circumstance to say that the original  
2     decision was a mistake, the district court did  
3     exactly what it was supposed to.

4             Justice Sotomayor, you were asking  
5     about how to address that. Our distinction  
6     between inadvertent mistakes and -- and all  
7     other mistakes would address that.

8             The other way to do it, if you were  
9     going to go with a broader understanding of  
10    "mistake" that Justice Kavanaugh has asked  
11    about, would be to -- to say that the focus of  
12    that inquiry is on whether it was a mistake at  
13    the time the decision was made.

14            And so this Court has said time and  
15    again that when there is binding precedent of a  
16    higher court, the lower courts are required to  
17    apply that precedent unless and until it's  
18    overturned.

19            So a district court that enters a  
20    decision that is correct on the day it's entered  
21    has not made a mistake in the sense that we  
22    think is relevant here. That would be better  
23    addressed under (b)(6).

24            JUSTICE BREYER: But, look, there are  
25    four circuits, it's the same question. From

1     what we can tell, my law clerks looked this up,  
2     the Second, Sixth, Seventh, and Eleventh say  
3     that basically, 60(b)(1) authorizes, based on  
4     relief, based on a legal mistake, as long as the  
5     time to appeal hasn't run.

6             And then my memo says that, looking at  
7     this, that the Fifth, Ninth, Tenth, and D.C.  
8     Circuits have said that some of the legal errors  
9     fall under 60(b)(1), fundamental misconceptions  
10    or obvious error of law, and you seem to be  
11    leaning in the second direction, and so you say  
12    it doesn't matter, you win regardless. But --  
13    but it seems as if there is a difference of  
14    opinion among the circuits, and part of our job  
15    is to try to create a harmony, and that's why I  
16    have the same question here.

17            You're very -- you want to do this.  
18    Why? I mean, just say, yeah, you have extra  
19    time, if you think you can convince this judge,  
20    you know, you appeal. Hey, you know, at least  
21    you have three judges who haven't considered  
22    this yet. Do you want to do that, or do you  
23    want to make this judge try to change his mind?  
24    Well, good luck.

25            But, if you want to, go ahead.

1                   MR. SNYDER: So -- so we think that  
2 part of the concern about the broader reading of  
3 60(b)(1), and I don't want to overstate this  
4 concern, but part of the concern is that  
5 60(b)(1) should not be treated as just a second  
6 round of relitigation so that the district court  
7 rules against you, you file a 59(e) motion. The  
8 district court rules against you again, you file  
9 a Rule 60(b)(1) motion.

10                   We don't think that's the way the --

11                   JUSTICE BREYER: Will there be any  
12 lawyers who will do that in the absence of  
13 inadvertence, et cetera, but if they want to do  
14 it, I mean, a judge has twice decided against  
15 them and now he's going to try to get him to  
16 change or her to change his mind?

17                   MR. SNYDER: So we don't think that  
18 the drafters would have structured this in a way  
19 that incentivized that. That sort of filing is  
20 just going to slow the process down.

21                   If the judge has really resolved the  
22 question in a way that you just disagree with,  
23 then the -- the correct course is onward and  
24 upward, seek -- seek review from a new group of  
25 -- of three judges, but don't force everyone to

1 sort of go back through the same exercise.

2 JUSTICE KAVANAUGH: Isn't the time  
3 limit designed to deal with that, that some  
4 courts have put in on filing 60(b)(1) motions  
5 interpreting what a reasonable time is? I  
6 thought that accomplished your concern or  
7 satisfied your concern there.

8 MR. SNYDER: So it does -- it does in  
9 significant part address that concern. A party  
10 could still file a 60(b)(1) motion in the  
11 circumstances I've described while also filing a  
12 notice of appeal, and those things could proceed  
13 on separate tracks.

14 So we think that reading 60(b)(1) in  
15 that broader way might create some unnecessary  
16 procedural messiness. We understand 60(b)(1) as  
17 existing --

18 JUSTICE KAVANAUGH: Has that happened  
19 often in the Second and other circuits?

20 MR. SNYDER: I -- I can't point to any  
21 significant disruption here. I mean, we -- we  
22 noted at the certiorari stage that there has  
23 never been a petition as far as we can tell  
24 about this issue before.

25 We do not think that the modest

1 disagreement between the courts of appeals on  
2 whether it's all errors or only obvious errors  
3 that are correctable under this particular  
4 provision is really a significant issue.

5           So I -- I don't want to claim that  
6 there has been a problem. But it's here now.  
7 And as you're thinking about how best to resolve  
8 it, we think that 60(b)(1) serves the function  
9 of allowing district courts to address the kind  
10 of mistakes that they would want to address, a  
11 mistake like this one, where the district court  
12 just never sort of grappled with the fact that  
13 there is this exception in Rule 13.3 that deals  
14 with situations where a petition for rehearing  
15 has been filed by one of the co-defendants.

16           JUSTICE KAGAN: But could you describe  
17 a little bit more -- I mean, if we're supposed  
18 to be giving guidance to courts, what is the  
19 category of mistakes, you know, assuming we go  
20 the narrower route that you suggested? How do  
21 we describe the compartment that's appropriate  
22 to think of in -- in this rule?

23           MR. SNYDER: So we would describe that  
24 test as whether the issue is one that the  
25 district court just overlooked in entering its

1 original judgment or if instead it's an issue  
2 that the district court considered and just  
3 resolved in a way that the movant disagrees  
4 with. And -- and that test will then be  
5 evaluated under an abuse of discretion standard  
6 because relief under 60(b) is discretionary.

7 If a litigant has doubt about whether  
8 the district court really grappled with the  
9 issue and thinks maybe the district court just  
10 missed this or maybe the district court just  
11 disagreed with me, file a notice of appeal.

12 If you want to file a 60(b)(1) motion  
13 and the district court can sort of resolve it by  
14 just looking at it and say no, I -- I really  
15 meant it, you can.

16 But we think that that sort of  
17 preserves litigants' rights while still allowing  
18 for district courts to deal with oversights in  
19 an expeditious fashion.

20 This is the point -- this is the part  
21 of Judge Friendly's opinion that we especially  
22 like. In that case, there was what he viewed as  
23 a mistake that occurred because of a subsequent  
24 decision 11 days after the original judgment has  
25 been entered.

1                   And so, on the majority interpretation  
2     in which Rule 60(b)(1) extends to mistakes of  
3     law by judges, the district court could say it  
4     is now clear on day 11 that this judgment I  
5     entered 11 days ago is going to be reversed on  
6     appeal.

7                   And rather than requiring the parties  
8     to file notice of -- notices of appeal and brief  
9     the issue and have the court of appeals get up  
10    to speed on what this case is about and send it  
11    back and we've got all this delay, I can just  
12    enter the decision today under 60(b)(1).

13                  And we think the rule serves a  
14    valuable function in that context. We're not  
15    here to say that it serves some huge function or  
16    that it replaces appeal, but we think it's  
17    valuable in that function.

18                  Justice Kavanaugh, you were asking  
19    about sort of the two-day interval. We agree  
20    that the rule has less utility after the 2009  
21    amendment to 59(e) that extended the deadline  
22    from 10 days to 28 days.

23                  Of course, at the time that the --  
24    that 60(b)(1) was adopted in 1946, there was a  
25    larger window. And even today, the rule



1 continues to be relevant in cases in which the  
2 government is a party or in cases in which it  
3 would be appropriate to grant an extension of  
4 the notice of appeal deadline or in cases where  
5 there is some showing why the petitioner really  
6 was unable to file within the time for filing a  
7 notice of appeal.

8           So it does preserve some flexibility,  
9 but we acknowledge that it serves less of a role  
10 today than it did when it was first adopted in  
11 1946.

12           I'd like to turn briefly if I could --  
13 this didn't really come up in the -- the opening  
14 part of the argument, but to the state law  
15 decisions that -- that Petitioner relies on as  
16 the only possible way of reconciling his rule or  
17 his interpretation with the text of Rule  
18 60(b)(1).

19           So he has a lot of structural  
20 arguments, but I don't think those arguments --  
21 I'm happy to address them, but I don't think  
22 they even get him anywhere unless he has some  
23 account of how "mistake" can possibly exclude  
24 mistakes of law and mistakes by judges. Justice  
25 Thomas, I think he acknowledged that his

1 interpretation is not a plain meaning  
2 interpretation.

3 And so what he said is that when Rule  
4 60(b) was adopted in 1938, 1937, the drafters of  
5 Rule 60(b) would have understood "mistake" as a  
6 term of art that applied only to mistakes of  
7 fact, not mistakes of law.

8 That is just completely wrong. The --  
9 the advisory committee note to the original  
10 version of the Federal Rules explained that Rule  
11 60(b) was based on California Code of Civil  
12 Procedure Section 473, and the California courts  
13 had repeatedly recognized that Section 473  
14 applied to both mistakes of law and mistakes of  
15 fact. So they did not read it in the term of  
16 art way that Petitioner proposes.

17 There were two other states that were  
18 also mentioned in the advisory committee note,  
19 New York and Minnesota. At page 6 of his reply,  
20 my friend acknowledges that those states also  
21 treated "mistake" as applying to both mistakes  
22 of law and mistakes of fact.

23 So this idea that it had a narrow  
24 idiosyncratic meaning that departed from its  
25 ordinary meaning and applied only to mistakes of

1 fact just isn't consistent with any of the --  
2 the three states that the advisory committee  
3 specifically pointed to.

4 And -- and my friend has made two  
5 other distinctions that I'll just sort of  
6 briefly address. One is he says that those  
7 cases applied Section 473 to mistakes of law  
8 only in the context of default judgments.

9 That's not true, as he eventually  
10 acknowledges in the reply brief. The Mitchell  
11 decision from the California Supreme Court in  
12 1909 applied Section 473 to a mistake of law in  
13 a case involving post-trial motions. So that  
14 limitation doesn't get him anywhere.

15 And even if you thought that there was  
16 some uncertainty about the California cases or  
17 don't want to go read them, Professor Moore in  
18 1938 explained how people would have understood  
19 that California practice in his treatise. And  
20 at page 3,280, he said that it clearly -- that  
21 the California provision clearly covered  
22 mistakes of law and mistakes of fact.

23 The other distinction that my friend  
24 has drawn is between mistakes by judges and  
25 mistakes by litigants. We think that by

1 deleting the word "his," the only textual  
2 limitation in Rule 60(b)(1), the advisory  
3 committee made clear that the rule would apply  
4 to mistakes by anyone. There's no textual basis  
5 in the rule after that amendment for  
6 understanding it to be limited to only mistakes  
7 by other parties or by third parties. And it's  
8 hard to see how mistakes by third parties, for  
9 example, would require relief from judgment  
10 unless they're adopted by the court.

11 Unless the Court has further  
12 questions, I'm happy to rest on our brief.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Thomas?

15 Justice Breyer?

16 Justice Alito?

17 Justice Barrett?

18 Thank you, counsel.

19 Mr. Adler, rebuttal?

20 REBUTTAL ARGUMENT OF ANDREW L. ADLER

21 ON BEHALF OF THE PETITIONER

22 MR. ADLER: Thank you, Mr. Chief  
23 Justice.

24 I guess I'll start with the state law  
25 cases. So my friend -- my friend talks a lot

1 about the advisory committee notes' reference to  
2 the California statute. But we don't start with  
3 advisory committee notes; we start with the text  
4 of the rule. And the text of the rule uses the  
5 exact same language as 17 states, and there's no  
6 dispute that at least 12 of the 17 categorically  
7 excluded legal errors. They said "mistake"  
8 meant mistake of law. That was the predominant  
9 view. That was captured by the leading  
10 treatises of the era.

11 My friend -- my friend talks a lot  
12 about -- so as for the California cases, you  
13 know, he refers to only one case that did not  
14 involve a default judgment. But that was dicta.  
15 That case actually involved a mistake of fact,  
16 the Mitchael case, not a mistake of law.

17 And the main point on the California  
18 cases is they had the general rule that we are  
19 saying, that "mistake" means mistake of fact,  
20 not law. The only exception was limited to  
21 default judgments based on a liberal policy in  
22 California favoring resolution on the merits.

23 So it's a limited exception in a  
24 minority of the states, where we have the  
25 predominant view in all of the other states

1 categorically saying "mistake" means mistake of  
2 fact. That is the meaning that got picked up in  
3 the text of the rule. That's the old soil that  
4 got carried forward.

5 As for the Professor Moore treatise in  
6 1938, my friend referred to page 3,280  
7 characterizing the California cases. The  
8 footnote there, footnote 28, refers only to the  
9 dicta in this Mitchael case, and all the others  
10 are default cases. That's it. So, again, a  
11 very limited exception there.

12 If you actually scroll back 7 pages  
13 earlier in the same treatise, to page 3,273,  
14 Professor Moore says that the bill of review for  
15 -- for errors of law was not covered by the  
16 wording of 60(b) because it was limited to  
17 mistakes of fact. So we think that suggests  
18 that 60(b) did not incorporate the default cases  
19 from California, and at the very least, it's a  
20 wash, at least they negate each other at the  
21 very least.

22 Justice Kavanaugh, you were asking  
23 about what's wrong with the Second Circuit's  
24 approach of sort of imposing this appeal  
25 deadline. The problem is it's inconsistent with

1 the text of the rule. Rule 60(c) does not  
2 incorporate Rule 4(a)'s deadlines. It talks  
3 about a reasonable time. That's a totality of  
4 the circumstances test.

5           You don't just import a categorical  
6 rule based on the totality of the circumstances.  
7 And that's, I think, what the government is now  
8 suggesting. In their brief, they were talking  
9 about a presumptive -- a presumption and  
10 flexible presumption. I don't know what that  
11 means. I don't know where that comes from, but  
12 litigants aren't going to know what it means.

13           And litigants need to know what the  
14 deadlines are on the front end. Do they have to  
15 file within 30 days, 60 days, what? It doesn't  
16 make sense to have a one-year outer deadline and  
17 then a flexible presumptive 30-day deadline on  
18 the inside. That's just inconsistent with Rule  
19 60(c)(1).

20           And the final point is because it's a  
21 presumption as the government frames it, and  
22 still contemplates people blowing by the appeal  
23 deadline, that cannot be right. That does not  
24 respect the deadlines of the other rules.

25           And the final point is I think it's

1 important to state -- take a step back and  
2 remember what the purpose of (b)(1) is. (B)(1)  
3 is not a substitute for an appeal. That's how  
4 the government is treating here.

5 (B)(1) is about mistakes of fact made  
6 by a party or someone in the litigation process.  
7 You make a mistake about what the trial date is.  
8 You make a mistake about whether you had been  
9 served with process. You make a mistake about  
10 whether the lawyer agreed to represent you. And  
11 then a judgment gets entered against you. The  
12 only recourse you have there is to reopen the  
13 judgment based on this mistake of fact. You  
14 can't appeal it.

15 It's a fundamentally different  
16 situation where the judgment itself contains a  
17 legal error. The -- we have appeals for that  
18 purpose. And the government is essentially  
19 treating 59(e) appeals as optional. You can  
20 blow right by the deadlines. I don't think that  
21 is correct.

22 So under our position, the -- the only  
23 viable option here is that (b)(1) does not cover  
24 legal errors. It doesn't cover judicial errors.  
25 Those are covered in other ways.



1                   So whichever way you slice it, (b)(1)  
2           doesn't cover this case. This case is governed  
3           by (b)(6). Mr. Kemp must show extraordinary  
4           circumstances on remand to reopen an erroneous  
5           final judgment. And that's a very high bar for  
6           a reason because it protects finality.

7                   Mr. Kemp asks only that he be -- be a  
8           afforded the opportunity to make that showing on  
9           remand.

10                   The judgment below should be reversed.

11                   CHIEF JUSTICE ROBERTS: Thank you,  
12           counsel.

13                   The case is submitted.

14                   (Whereupon, at 12:01 p.m., the case  
15           was submitted.)

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